Filed 5/30/07 Lesinski v. Blank CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THOMAS LESINSKI et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>MARTIN H. BLANK, JR. et al.,<br><br>Defendants and Respondents. | B186001<br><br>(Los Angeles County<br>Super. Ct. No. SC081466) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Affirmed.

Berke Kent & Ward, Ted Ward; Benedon & Serlin, Gerald M. Serlin and Douglas G. Benedon for Plaintiffs and Appellants.

Golob, Bragin & Sassoe and Albert L. Sassoe, Jr. for Defendants and Respondents.

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## I. INTRODUCTION

This case involves the sale of real property and the sellers' alleged failure to disclose material facts. Plaintiffs, Thomas Lesinski and Margaux Tarantino, appeal from a summary judgment in favor of the defendants, Martin H. Blank, Jr. and Richard Ziman, as trustees of the Arthur and Rosalinde Gilbert 1982 Trust (the trust) and The Gilbert Public Arts Foundation (the foundation). Plaintiffs purchased the property. We affirm the judgment.

## II. BACKGROUND

Arthur[1] and Rosalind Gilbert resided in a home on Heather Road in Beverly Hills. The property's driveway was lined with 82 Italian cypress trees. In October 1998, Mr. Gilbert received a report prepared by Jerrold Turnery, Ph.D., an arborist. Dr. Turney reported the Italian cypress and Monterey pine trees on the Gilberts' property were infected with a fungus that causes root rot and can spread to other plants. Dr. Turney recommended treating the cypress and pine trees with "Subdue," a fungicide. Dr. Turney stated, "Depending on their rate of *recovery* they will need to be treated either once a year or twice a year after the first three treatments." (Italics added.) Dr. Turney also advised that limiting irrigation was an important means of controlling the root rot. In addition, Dr. Turney stated that treating the pines with "Mycor Tree Saver" should result in "a fuller canopy, improved overall growth and better foliage color," after 6 to 12 months of use. In addition, according to the report, "The canker on the dead branch from the Italian Cypress is caused by the fungus *Coryneum.*" Dr. Turney explained: "There

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[1] Mr. Gilbert was not related in any fashion to the Presiding Justice of Division Six of this appellate district, the Honorable Arthur Gilbert.

are no controls for this disease other than keeping your tree as healthy as possible. In your area it should not be a severe problem. It is attacking your trees due to the stress from the root rot. If you control the root rot it will also limit the activity of coryneum canker."

On October 12, 1998, Mr. Gilbert sent Dr. Turney's report via facsimile transmission to Mitchell Pest Control, Inc. The cover sheet stated: "Enclosed i[s] a report received from Dr. Turney. [¶] Please start with the Italian Cypress. I would like an estimate for immediate attention – and then we will talk about the Pines." Thomas E. Wurster, Mitchell Pest Control, Inc.'s general manager, declared that from May 1991 through May 2002, the company had treated the trees at the Heather Road property, including the Italian cypress. Mr. Wurster stated, "The treatment generally involved spraying the trees for mites on a twice annual basis." Following receipt of Mr. Gilbert's facsimile transmission, in October 1998, January 1999, and April 2001, Mitchell Pest Control, Inc. treated the trees with a fungicide.

The Gilberts placed the Heather Road property in the trust. Mr. Gilbert passed away in 2001. Prior to his death, Mr. Gilbert served as a trustee of the trust. Following Mr. Gilbert's death, defendants served as trustees. The facts are disputed as to whether defendants also served as trustees prior to Mr. Gilbert's death. Mr. Ziman testified that: defendants served as trustees prior to Mr. Gilbert's death in 2001; Mr. Ziman became a trustee 5 to 10 years prior to Mr. Gilbert's death; and Mr. Gilbert subsequently brought Mr. Blank in as an additional trustee. Mr. Blank testified he performed legal services for the trust. These legal services were rendered prior to Mr. Gilbert's death. However, Mr. Blank denied serving as a trustee prior to Mr. Gilbert's death. In a declaration filed in support of defendants' summary judgment motion, Mr. Blank declared, "[A]t no time prior to the death of Arthur Gilbert in September 2001 were Richard Ziman or I Trustees of The Arthur Gilbert and Rosalinde Gilbert 1982 Trust." In addition, the trust instrument provided for the successor trustees to become trustees only upon Mr. Gilbert's death or other inability to act as trustee.

In any event, in October 2001, Mrs. Gilbert informed Mitchell Pest Control, Inc. that her husband had just passed away and she did not want the trees treated at that time. In May 2002, Mitchell Pest Control, Inc. treated the trees a fourth and final time pursuant to a work order identifying the customer as the estate. Mitchell Pest Control sent an invoice for its May 2002 work to the estate at 9536 Wilshire Boulevard, Suite 420, in Beverly Hills and to the address of the property at issue here. Payment was subsequently received. Both the work order and the invoice stated the Italian cypress trees were sprayed for mites. Following the May 2002 service, Mitchell Pest Control mailed out a service reminder regarding the trees' treatment and followed up with a telephone message, but received no response. Monina Umali, a foundation employee, testified at her deposition that Mr. Blank was responsible for ordering services at the Heather Road property after Mr. Gilbert's death. According to Ms. Umali, Mr. Blank approved the bills for such services and signed the checks. Mr. Blank did not recall whether he had ever signed a check in connection with a Mitchell Pest Control, Inc. invoice.

In January 2003, defendants placed the property for sale. In April 2003, plaintiffs and defendants agreed to a sale of the property. The documents they executed included a "Buyer's Inspection Advisory." The parties agreed, "Buyer acknowledges that since Seller is acting in fiduciary capacity, it is not obligated to make disclosures, representations or warranties that might be required from a non-fiduciary seller." The inspection advisory also stated: "Seller is required to disclose to you material facts known to him/her that affect the value or desirability of the Property. However, Seller may not be aware of some Property defects or conditions. Seller does not have an obligation to inspect the Property for your benefit nor is Seller obligated to repair, correct or otherwise cure known defects that are disclosed to you or previously unknown defects that are discovered by you or your inspectors during escrow." The inspection advisory further stated plaintiffs were advised to conduct inspections for "botanical diseases" as well as other matters.

In or about April 2003, before the sale agreement was executed, Bridget Martens, plaintiffs' broker, overheard Joyce Rey, defendants' real estate agent, speaking on a cellular telephone. Ms. Rey was in the driveway of the Heather Road property. Ms. Martens testified, "[Ms. Rey] commented that the property was looking very dry, and she was speaking to the trustee's office and commented that the property was looking very dry and had the gardeners been watering . . . ." Ms. Martens did not know to whom Ms. Rey was speaking. But Ms. Martens believed Ms. Rey was speaking to someone in the trustees' office. After escrow opened, Ms. Martens relayed to Mr. Lesinski that she had overheard Ms. Rey's conversation. Mr. Lesinski also heard from several people—a nurse and a caretaker, who worked at the Heather Road residence as well as a gardener—that "the lawyers" had stopped taking care of the trees because they were "cheap." They also said: "'The trees used to be beautiful. [The lawyers] stopped taking care of the trees—they stopped spraying the trees.'" Mr. Lesinski conceded that a visual inspection of the trees did not reveal a problem. He testified: "[T]he trees in general looked really good to me, looking back on it. I remember them being green, healthy; there were a couple that looked like they needed a little more water, but there was nothing that indicated to me in any way, shape or form that hundreds of them, or whatever the total count is, had a disease." Upon subsequent closer inspection, Mr. Lesinski observed, "A couple of [the trees had] turned brown, a couple had their stumps removed[, but] [t]he vast majority of them looked perfect . . . ." Plaintiffs hired an arborist, Edwin Vargas, to examine the trees. Mr. Vargas told plaintiffs the trees were suffering from an incurable disease and would have to be removed. The cost to remove the Italian cypress trees and replace them was $143,000.

On May 12, 2003, plaintiffs informed defendants the cypress trees were dying. In response, defendants offered to close escrow and refund plaintiffs' money. Plaintiffs declined. Through an attorney, plaintiffs indicated in writing they intended to proceed with the escrow closing, "Our clients are proceeding to close, but expressly reserving all of their rights and remedies arising out of the matters outlined in the attached letter, none

of which are waived." After the sale was complete, plaintiffs brought this action for contract breach, fraud, and negligent misrepresentation.

In their first amended complaint, plaintiffs alleged that during escrow they discovered the cypress trees were diseased, would have to be removed, and replaced at a cost in excess of $140,000. Plaintiffs alleged the cypress trees were infested with a fungus "that often progresses until the tree dies" and most of the trees had "well developed" infections. Plaintiffs further alleged defendants: "were aware or should have been aware of the diseased [t]rees . . . [but] did not disclose the condition to the [p]laintiffs"; "knew of the state of the [t]rees and failed or refused to disclose the condition to the [p]laintiffs"; and "were also aware that [p]laintiffs had no knowledge of the condition of the diseased [t]rees, and believed them to be healthy . . . ." Plaintiffs asserted: defendants breached their contractual duty to disclose material facts and defects regarding the property; defendants fraudulently concealed the material facts regarding the trees; and defendants negligently misrepresented or failed to disclose the state of the trees.

Defendants sought summary judgment or adjudication on two independent grounds. First, defendants asserted they did not breach their duty to disclose known facts because they had no knowledge the trees were suffering from a fatal disease. Second, defendants argued plaintiffs were offered, but declined, an opportunity to cancel the escrow and walk away from the transaction after discovering the trees were incurably diseased.

Defendants presented evidence as follows on the knowledge issue. When escrow opened, they had no knowledge the Italian cypress trees lining the driveway had any fatal disease. The first time defendants learned of the diseased nature of the trees was when plaintiffs raised the subject. Defendants learned the trees' condition was terminal only after escrow closed. In June 2003, defendants retained Dr. Turney to investigate and diagnose the trees' condition. Dr. Turnery determined the Italian cypress trees were suffering from cypress canker, caused by a fungus, an incurable disease; further, the only

thing to do was to totally remove the trees as the disease would spread. Dr. Turney stated further: "When I examined the Italian cypress trees in June of 2003 it was apparent to any person who closely examined the trees that the cypress trees were not in good condition and something was wrong. However, the specific fatal malady of cypress canker was not readily apparent, particularly to a lay person. I was able to diagnose the cypress canker disease after a careful examination of the tree trunks as well as the pruned portions of the trees based on my education, training and years of experience working as a certified arborist."

Plaintiffs opposed the summary judgment motion. Plaintiffs asserted: following Mr. Gilbert's death, Mr. Blank was responsible for the property's maintenance, including the grounds; Mr. Blank reviewed invoices and signed all checks; defendants visited the property numerous times over the years after Mr. Gilbert's death; and in or about April 2003, before the purchase and sale agreement was executed, Ms. Martens, plaintiffs' real estate broker, overheard Ms. Rey, the trustees' real estate agent, tell a trust representative by cellular telephone that the property looked dry. The trial court found defendants presented admissible evidence they had no knowledge of the trees' condition until after escrow opened. The trial court further ruled that plaintiffs failed to present evidence creating a triable issue as to actual knowledge. Accordingly, the trial court entered a judgment in defendants' favor.

## III. DISCUSSION

### A. Standard of Review

We apply the following summary judgment standard of review in terms of the merits as articulated by the Supreme Court. In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851, the Supreme Court described a party's burdens on a summary judgment or adjudication motion as follows: "[F]rom commencement to conclusion, the

party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . . [¶] . . . [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (Fns. omitted; see *Kaneko v. Yager* (2004) 120 Cal.App.4th 970, 976-977; *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) We review the trial court's decision to enter summary judgment de novo. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65, 67-68; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188, disapproved on another point in *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 854, fn. 19.) The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling, not its rationale. (*Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196; *Dictor v. David & Simon, Inc.* (2003) 106 Cal.App.4th 238, 245.)

B. Evidentiary Rulings

Plaintiffs contend the trial court erroneously sustained defendants' objections to evidence offered in opposition to the motion. We need not consider those evidentiary rulings. This is so because the trial court observed, "[T]he ruling on the merits would be the same irrespective of the rulings on the evidence offered by plaintiffs." We agree that

even if we consider all of plaintiffs' evidence, they failed to raise a triable issue of material fact.

### C. There Was No Triable Issue of Material Fact

#### 1. The duty to disclose

Plaintiffs contend defendants breached contractual and common law duties to disclose giving rise to liability for contract, fraud, and negligence. Plaintiffs argue, "The suppression of material facts, which a seller has a duty to disclose, is a breach of contract, fraud and negligence." Further, plaintiffs contend, "A seller's failure to fulfill this duty of disclosure is not only a breach of contract, but also fraud or deceit . . . [and] may also lead to liability based on negligence." Defendants assert plaintiffs cannot recover on a non-fraud cause of action because they closed escrow with knowledge the trees were dying. (See *Jue v. Smiser* (1994) 23 Cal.App.4th 312, 316, fn. 4.) We need not resolve that issue. As discussed below: the contractual and common law duties rest on defendants' actual knowledge of the undisclosed facts; defendants established their lack of actual knowledge; and plaintiffs have not raised a triable issue as to the requisite knowledge.

A duty to disclose may arise under a contract. (See Civ. Code, § 1572, subd. 3; *Wilkins v. National Broadcasting Co.* (1999) 71 Cal.App.4th 1066, 1082; *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 337.) Here, the parties agreed, "Seller shall disclose all facts and defects concerning the Property *of which they have knowledge* including, without limitation, all material and structural repairs and all repairs to the hillside or foundation that have been made to the Property, past or present." (Italics added.) A seller of real property has a common law duty to disclose as follows: "It is now settled in California that where the seller *knows of facts* materially affecting the value or desirability of the property which are known or accessible only to him *and also knows*

that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. [Citations.] Failure of the seller to fulfill such duty of disclosure constitutes actual fraud. [Citations.]" (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 735-736, italics added; accord, *Herzog v. Capital Co.* (1945) 27 Cal.2d 349, 353; *Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 410; *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1544; *Reed v. King* (1983) 145 Cal.App.3d 261, 265; see *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 347-348.) The Court of Appeal has explained: "The duty to disclose arises when two elements are present: (1) the material fact is known to (or accessible only to) the defendant; and (2) *the defendant knows the plaintiff is unaware of the fact and cannot reasonably discover the undisclosed fact.* (*Reed v. King*[, *supra,*] 145 Cal.App.3d [at p.] 265; *Karoutas v. HomeFed Bank* (1991) 232 Cal.App.3d 767, 771.)" (*San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1055, orig. italics, fn. omitted.) The seller must have actual knowledge; (*Assilzadeh v. California Federal Bank, supra,* 82 Cal.App.4th at p. 410; see *Goodman v. Kennedy, supra,* 18 Cal.3d at p. 347; *Shapiro v. Sutherland, supra,* 64 Cal.App.4th at pp. 1544-1545; Miller & Starr, Cal. Real Estate (3d ed. 2000) § 1:140, p. 506 ["[t]here is no 'should have known' standard"].) Whether the seller had actual knowledge is typically a question of fact. (*Shapiro v. Sutherland, supra,* 64 Cal.App.4th at p. 1544; *Curran v. Heslop* (1953) 115 Cal.App.2d 476, 481.) Actual knowledge may be proved by both direct and circumstantial evidence; but it may not be inferred from circumstances based on speculation or conjecture. (See *Chaney v. Superior Court* (1995) 39 Cal.App.4th 152, 157; *Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 514, fn. 4.)

2. Defendants met their burden

As discussed above, the pivotal question in this case is whether defendants knew the cypress trees were fatally afflicted. Absent actual knowledge, they could not be liable

on the asserted contract or tort theories for intentionally or negligently failing to disclose the trees' condition. In support of their summary judgment motion, defendants presented evidence that prior to escrow opening, they had no information to the effect that the Italian cypress trees "had any fatal malady or disease." Eventually, plaintiffs informed defendants that Mr. Vargas, the arborist, had determined the trees were dying. Defendants then offered to refund plaintiffs' money and cancel the escrow. Plaintiffs rejected defendants' offer. The foregoing evidence sufficed to shift the burden of production to plaintiffs to show a triable issue as to defendants' actual knowledge the cypress trees were fatally diseased. (See *Shapiro v. Sutherland, supra,* 64 Cal.App.4th at pp. 1546-1547; cf. *Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1369-1371; *Yuzon v. Collins* (2004) 116 Cal.App.4th 149, 163-166.)

3. Plaintiffs failed to raise a triable issue of material fact

First, plaintiffs argue Mr. Gilbert had actual knowledge the cypress trees were dying. Plaintiffs reason that because defendants were co-trustees with Mr. Gilbert, his knowledge is imputed to them. There is no evidence Mr. Gilbert had actual knowledge the cypress trees were incurably diseased. Dr. Turney's initial report stated: the cypress trees were infected with a fungus that caused root rot; he recommended treatment with a fungicide; and any treatment frequency would depend on the cypress trees' "rate of recovery." With respect to the Coryneum fungus found in the cypress trees, Dr. Turney concluded: there were "no controls" for the fungus; "it should not be a severe problem"; and controlling the root rot would also "limit the activity" of the fungus. This evidence, liberally construed, does not support an inference Mr. Gilbert knew the cypress trees would die.

Moreover, even if Mr. Gilbert had actual knowledge the cypress trees were dying, defendants' liability cannot rest on such imputed knowledge. As discussed above, a real estate property owner's disclosure duty arises when two requirements are present. The

first factor is the material fact must be known to the defendant. The second requirement is that the plaintiff is unaware of the fact and cannot reasonably discover the undisclosed matter. (*San Diego Hospice v. County of San Diego, supra,* 31 Cal.App.4th at p. 1055, orig. italics; accord, *Reed v. King, supra,* 145 Cal.App.3d at p. 265; *Lingsch v. Savage, supra,* 213 Cal.App.2d at p. 739.) With respect to the second element, the Court of Appeal for the Fourth Appellate District, Division One, has held, in an opinion by now Retired Associate Justice Charles W. Froehlich, Jr.: "Since the second prong giving rise to an affirmative obligation to disclose rests on the defendant's knowledge of significant facts the plaintiff needs but does not have, we conclude the duty cannot arise when, as here, such significant facts are not *actually* known to the defendant. . . . Even assuming imputed knowledge satisfies the first element of the 'duty' analysis, we cannot perceive how imputed knowledge can satisfy the second element giving rise to a duty to disclose: scienter. (*Lingsch v. Savage*[, *supra,*] 213 Cal.App.2d [at pp.] 738-739 . . . .) . . . If a principal is actually unaware of the material fact, how is the principal to *know* that the plaintiff is also unaware or cannot reasonably discover the material fact? The duty to disclose requires some element of scienter-knowledge of the other party's ignorance. We cannot perceive how it is possible for a principal to know the other party is ignorant of something of which the principal is equally ignorant. [¶] We are unwilling to impose upon a party a duty to disclose when, as here, that party cannot possibly satisfy the duty." (*San Diego Hospice v. County of San Diego, supra,* 31 Cal.App.4th at pp. 1055-1056; accord, Miller & Star, Cal. Real Estate, *supra,* § 1:140.) We find that reasoning persuasive. Defendants, with no actual knowledge the trees were fatally infected, could not know plaintiffs were unaware of that fact.

Second, plaintiffs argue Ms. Rey, defendants' real estate agent, had actual knowledge the cypress trees were dying, and that knowledge is imputed to defendants. However, there is no evidence Ms. Rey had actual knowledge of the trees' condition. She was overheard saying only that the property "was looking very dry." In any event, as discussed above, defendants' liability could not rest on imputed knowledge.

Third, plaintiffs assert defendants are subject to liability for failing to act in light of information their agent, Ms. Rey, *should have acquired* as obligated by Civil Code section 2079. Civil Code section 2079 provides in pertinent part: "(a) It is the duty of a [licensed] real estate broker or salesperson . . . to a prospective purchaser of residential real property comprising one to four dwelling units . . . to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal . . . ." Here, the undisputed evidence established a "reasonably competent and diligent visual inspection of the property" would not have revealed that the cypress trees were severely diseased and dying. Dr. Turney declared that even after escrow closed, a close examination of the cypress trees would have revealed they "were not in good condition," but a layperson would not have known the trees were diseased and dying. Further, Mr. Lesinski conceded that the trees had generally "looked really good" to him. He declared, "[T]here were a couple that looked like they needed a little more water, but there was nothing that indicated to me in any way, shape or form that hundreds of them . . . had a disease." Even if defendants could be liable for failing to disclose information acquired by Ms. Rey pursuant to a competent and diligent visual inspection of the property, there was no evidence such scrutiny would have revealed the cypress trees *were diseased and dying.*

Fourth, plaintiffs argue they introduced direct and circumstantial evidence establishing defendants' actual knowledge the cypress trees were dying. We find the evidence failed to raise a triable issue as to defendants' actual knowledge the cypress trees were incurably diseased. As discussed above, Dr. Turney's initial report, which Mr. Gilbert forwarded to Mitchell Pest Control, Inc., said the fungus attacking the cypress trees was "not [ ] a severe problem." Further, according to Dr. Turney, controlling the root rot would limit its activity. The subsequent work order and invoice from Mitchell Pest Control, Inc., in May 2002, did not refer to any fatal disease; those documents reflect that the cypress trees were sprayed for mites. Ms. Rey commented only that the property

looked very dry. Mr. Lesinski heard from others that "the lawyers" had stopped taking care of the trees and had stopped spraying them. This, it was asserted was because "the lawyers" were "cheap." And a visual inspection of the property did not reveal that the cypress trees were fatally afflicted. Viewed in a light most favorable to plaintiffs, the evidence might support an inference, based on Mr. Turney's initial report, that defendants knew the trees on the property needed to be treated for root rot and fungus. But there is no evidence either defendant ever saw that report. Moreover, plaintiffs do not claim damages because they might have to treat the trees in the future. Rather, plaintiffs assert the trees are dying and will have to be cut down. Plaintiffs seek to recover for the cost to remove the cypress trees and replace them with other trees, not the cost to treat them for disease in the future. In short, plaintiffs failed to raise a triable issue as to defendants' actual knowledge the Italian cypress trees were fatally diseased.

Fifth, in their opening brief on appeal, plaintiffs repeatedly assert Ms. Rey was overheard saying that the trees were "noticeably" brown. Plaintiffs assert: "the Trustees' real estate agent had called the Trustees and notified them that there was a problem with some of the Trees, which had turned noticeably brown"; "[t]he Trustees' agent stated that something had to be done because there was a problem with some of the Trees, which were noticeably brown"; "the Trustee's real estate agent contacted the Trustees' office on her cell phone and stated that something had to be done because there was a problem with the Trees, which were noticeably brown"; and "[t]he Trustees' real estate agent spoke to the Trustees' office and told them that something had to be done because there was a problem with the Trees, which were noticeably brown." However, the record does not support these assertions. Instead, plaintiffs' real estate agent, Ms. Martens, testified at her deposition that she overheard defendants' real estate agent, Ms. Rey, speaking on her cell phone while in the driveway of the Heather Road property: "She commented that the property was looking very dry, and she was speaking to the trustee's office and commented that the property was looking very dry and had the gardeners been watering . . . ." Ms. Martens did not know with whom Ms. Rey was "actually" speaking.

The following exchange with Ms. Martens occurred at her deposition: "Q . . . [D]id you think the property was dry at that point? [¶] A Yes. [¶] Q What in particular of the property did you think was dry? [¶] A As you approach—as you went down the driveway, the [Italian cypress] trees were noticeably brown." (Italics added.) So it was Ms. Martens, not Ms. Rey, who described the trees as "noticeably brown." In their reply brief on appeal, plaintiffs assert: "[T]he Trustees' real estate agent knew that something had to be done because there was a problem with the Trees, which were noticeably brown and defective." Further, plaintiffs argue, "[T]he Trustees' real estate agent had actual knowledge of the Trees' condition—i.e., she recognized the Trees were in a state of decline, diseased, and/or dying . . . ." The evidence before the trial court does not support this analysis.

D. Attorney's Fees

Defendants seek attorney's fees on appeal pursuant to the residential purchase agreement between the parties. That request is unopposed. The contract provides in pertinent part, "In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller . . . ." Defendants are entitled to costs on appeal (California Rules of Court,[2] rule 8.276(a)(1) & (2)) including those incurred on appeal. (Rules 8.276(c)(2), 3.1702.) Defendants may seek such fees in the trial court upon issuance of the remittitur. (Rules 8.276(d), 3.1702(a) & (c); *Van Slyke v. Gibson* (2007) 146 Cal.App.4th 1296, 1300.)

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2 All further references to a rule are to the California Rules of Court.

## IV. DISPOSITION

The judgment is affirmed. Defendants, Martin H. Blank, Jr. and Richard Ziman, as trustees of the Arthur and Rosalinde Gilbert 1982 Trust and the Gilbert Public Arts Foundation, are to recover their costs on appeal jointly and severally from plaintiffs, Thomas Lesinski and Margaux Tarantino.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

ARMSTRONG, J.

MOSK, J.